A

Nathan a/l Rajandran v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W–07-62–06 OF 2021
SURAYA OTHMAN, ABU BAKAR JAIS AND SEE MEE CHUN JJCA
29 NOVEMBER 2021

C

Criminal Procedure — Bail — Granting or refusing bail — Accused charged with sabotage under s 124K of Penal Code — Accused applied to be released on bail pending on going criminal proceedings — Whether offence under s 124K of Penal Code fell outside ambit of Security Offences (Special Measures) Act 2012 — Whether court had power to grant bail under s 388 of Criminal Procedure Code — Penal Code s 124K — Criminal Procedure Code s 388

D

The accused ('applicant') was charged under s 124K of the Penal Code ('the PC'). A notice of motion was filed by the applicant that he be released on bail pending on going criminal proceedings against him. He also sought an order that the offence under s 124K of the PC did not fall under the ambit of the Security Offences (Special Measures) Act 2012 ('the SOSMA'). The submissions of the applicant were, inter alia, that: (a) s 124K of the PC fell outside the ambit of SOSMA; and (b) the court was vested with the power to grant bail under s 388 of the Criminal Procedure Code ('the CPC') regardless of the constitutionality of s 13 of the SOSMA.

E

F

Held, dismissing the application:

(1) Section 124K of the PC under which the applicant was charged, related to sabotage of water services which was an essential service defined in s 130A(d)(a) of the PC. It was an action which fell under art 149(1)(e) of the Federal Constitution 'which is prejudicial to the maintenance of the functioning of any supply or service to ...'. When this had been excluded in the preamble, it followed that there was ambiguity as to whether s 124K of the PC was intended to be categorised as a security offence notwithstanding its inclusion in the First Schedule to SOSMA. The mere presence of s 124K of the PC in the First Schedule to SOSMA must be looked at in the overall scheme of the purpose and object of SOSMA which had always been to combat terrorism. The court adopted the words in *Public Prosecutor v Khairuddin bin Abu Hassan & Anor* [2017] MLJU 188 that: 'SOSMA being a law which prescribes limitation on the liberty clauses must be construed religiously and any ambiguity must be resolved in favour of the respondents.' Thus, s 124K of the PC did not fall within the ambit of SOSMA. It followed too that s 13 of the SOSMA did

G

H

I

not apply and it did not behove on the court to make any finding on its constitutionality or otherwise (see paras 12–15).

(2) From the proviso to s 388(1) of the CPC, the applicant may be allowed bail if he was 'sick or infirm' as he did not fall within the other criteria. That was the threshold level. None of the reasons put forth could point towards that. Once the threshold was met, the other factors such as flight risk or witness tampering may be considered. Under the circumstances, the applicant had not met the conditions for bail to be granted and the court was constrained to dismiss his application (see para 21).

[Bahasa Malaysia summary

Tertuduh ('pemohon') didakwa di bawah s 124K Kanun Keseksaan ('KK'). Notis usul telah difailkan oleh pemohon supaya dia dibebaskan dengan ikat jamin sementara menunggu prosiding jenayah terhadapnya. Beliau juga memohon perintah supaya kesalahan di bawah s 124K KK tidak termasuk dalam lingkungan Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 ('SOSMA'). Hujahan pemohon adalah, antara lain, bahawa: (a) s 124K KK jatuh di luar lingkungan SOSMA; dan (b) mahkamah diberi kuasa untuk memberikan jaminan di bawah s 388 Kanun Tatacara Jenayah ('KTJ') tanpa mengira perlembagaan s 13 SOSMA.

Diputuskan, menolak permohonan:

(1) Seksyen 124K KK di mana pemohon didakwa, berkaitan dengan sabotaj perkhidmatan air yang merupakan perkhidmatan penting yang ditakrifkan dalam s 130A(d)(a) KK. Ia adalah tindakan yang jatuh di bawah perkara 149(1)(e) Perlembagaan Persekutuan 'yang memudaratkan penyenggaraan atau perjalanan apa-apa bekalan atau perkhidmatan kepada...'. Apabila ini telah dikecualikan dalam mukadimah, ia diikuti bahawa terdapat kesamaran sama ada s 124K KK bertujuan untuk dikategorikan sebagai kesalahan keselamatan meskipun ia dimasukkan dalam Jadual Pertama SOSMA. Kehadiran s 124K KK dalam Jadual Pertama SOSMA mesti dilihat dalam skema keseluruhan tujuan dan objek SOSMA yang sentiasa memerangi keganasan. Mahkamah menerima pakai kata-kata dalam *Public Prosecutor v Khairuddin bin Abu Hassan & Anor* [2017] MLJU 188 bahawa: 'SOSMA being a law which prescribes limitation on the liberty clauses must be construed religiously and any ambiguity must be resolved in favour of the respondents'. Oleh itu, s 124K KK tidak termasuk dalam lingkungan SOSMA. Ia juga diikuti bahawa s 13 SOSMA tidak terpakai dan adalah tidak perlu bagi mahkamah membuat apa-apa dapatan mengenai perlembagaannya atau sebaliknya (lihat perenggan 12–15).

(2) Daripada proviso s 388(1) KTJ, pemohon boleh dibenarkan diikat jamin jika dia 'sakit atau lumpuh' kerana dia tidak termasuk dalam kriteria lain.

Itu adalah nilai ambang. Tiada satu pun alasan yang dikemukakan boleh menunjukkan ke arah itu. Setelah ambang dipenuhi, faktor lain seperti risiko pelarian atau gangguan saksi boleh dipertimbangkan. Dengan keadaan itu, pemohon tidak memenuhi syarat untuk jaminan diberikan dan mahkamah telah terpaksa untuk menolak permohonannya (lihat perenggan 21).]

Cases referred to

PP v Dato' Balwant Singh (No 1) [2002] 4 MLJ 427; [2002] 4 CLJ 155, HC (refd)
PP v Khairuddin bin Abu Hassan & Anor [2017] MLJU 188; [2017] MLRAU 90, CA (folld)
PP v Yazid bin Sufaat & Ors [2015] 1 MLJ 571; [2014] 2 CLJ 670, CA (refd)
Raman a/l Shunmugham lwn Pendakwa Raya [2020] 2 MLJ 675; [2020] 2 CLJ 818, CA (refd)
Tamil Selven a/l Letchumenan v Pendakwa Raya [2019] MLJU 1123; [2019] 1 LNS 1542, CA (refd)

Legislation referred to

Criminal Procedure Code s 388, 388(1)
Federal Constitution art 149(1)(a), (1)(b), (1)(d), (1)(e), (1)(f)
Penal Code s 124K, 124L, 130A(d)(a), (h)(iii), 130V(1), Chapters VI, VIA, First Schedule
Security Offences (Special Measures) Act 2012 ss 2, 4(5), 13, 13(2), First Schedule

Harpal Singh (T Harpal & Assoc) for the applicant.
Nurul Farhana Khalid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

See Mee Chun JCA:

INTRODUCTION

[1] Enclosure 1 is a notice of motion dated 1 June 2021 filed by the applicant/accused that he be released on bail pending on going criminal proceedings vide Case No WA-45SO-4–03 of 2021 against him. He also seeks an order that the offence under s 124K of the Penal Code does not fall under the ambit of the Security Offences (Special Measures) Act 2012 (Act 747) ('the SOSMA').

THE CHARGE

[2] The applicant was charged under s 124K of the Penal Code and the details are as follows:

Pada menjalankan kuasa-kuasa yang diberikan di bawah seksyen 177A(1) Kanun Tatacara Jenayah dan terletak hak pada saya menurut Seksyen 376(3) kanun yang sama, saya MUHAMAD ISKANDAR BIN AHMAD, Timbalan Pendakwa Raya, Negeri Selangor Darul Ehsan dengan ini memberi izin bagi pendakwaan terhadap:

1. NATHAN A/L RAJADRAN (NO KP: 771205–14–5285)
2. LIM KIAN AIK (NO KP: 780116-14-5519)

Bagi kesalahan melakukan sabotaj dengan niat untuk mendatangkan mudarat kepada perkhidmatan air di Negeri Selangor dan merupakan satu kesalahan di bawah Seksyen 124(K) Kanun Keseksaan yang dikatakan telah dilakukan antara 2 haribulan sehingga 10 haribuian November 2020 bertempat di permis No. 32 Jafan Velox 2 Taman Velox, Rawang dalam Daerah Gombak, dalam Negeri Selangor Darul Ehsan.

[3] The charge is as follows:

Whoever, by any means, directly or indirectly, commits sabotage shall be punished with imprisonment for life.

SUBMISSIONS OF THE APPLICANT

[4] The submissions of the applicant were that s 13 of the SOSMA is unconstitutional; s 124K of the Penal Code falls outside the ambit of SOSMA; the power to remand under s 4(5) of the SOSMA is no longer in force; there are five exceptions in s 13(2) of the SOSMA for which bail may be granted subject to the discretion of Court; the Court is vested with power to grant bail under s 388 of the Criminal Procedure Code regardless of the constitutionality of s 13 of the SOSMA; and the circumstances and factors to consider in allowing the applicant's bail application.

SUBMISSIONS OF THE DEPUTY PUBLIC PROSECUTOR (DPP)

[5] It was submitted that s 124K of the Penal Code is a security offence and unbailable under s 13 of the SOSMA unless the three categories are met and it is also subject to an application by the DPP to be released on bail. Section 13 of the SOSMA overrides s 388 of the Criminal Procedure Code. The application for bail ought to have been made under s 13 of the SOSMA.

ANALYSIS AND DECISION

[6] Although there were many issues put forth by the applicant, in particular on the constitutionality of s 13 of the SOSMA pertaining to bail, we felt it was not necessary to consider all of them. This is because the notice of motion as filed seeks for the release of the applicant on bail and that the offence under s 124K of the Penal Code does not fall under SOSMA. Hence we will look at two issues as put forth by the applicant, namely that the s 124K of the

Penal Code falls outside the ambit of SOSMA and that the court has power to grant bail under s 388 of the Criminal Procedure Code.

Whether the offence under s 124K of the Penal Code falls outside the ambit of SOSMA

[7] It cannot be gainsaid that s 2 of the SOSMA prescribes its application to 'security offences' which as per s 3 'means the offences specified in the First Schedule'. Further, the offence under s 124K of the Penal Code being an offence under Chapter VI is an offence specified in the First Schedule. However we find that this does not *ipso facto* render s 124K of the Penal Code as falling within the ambit of SOSMA.

[8] The Court of Appeal in an earlier case of *Public Prosecutor v Khairuddin bin Abu Hassan & Anor* [2017] MLJU 188; [2017] MLRAU 90 had occasion to consider this very same issue. That case concerned an offence under s 124L of the Penal Code which was for the offence of sabotage of banking and financial services. Our offence here is that of sabotage of water services. But nothing turns on this. This is because the element of sabotage is still there where it is defined in s 130A(h)(iii) of the Penal Code as an act of omission intending to cause harm to the maintenance of essential services. Section 130A(d)(a) in turn includes 'water services' as essential services.

[9] In *Khairuddin,* the court noted the following at pp 7, 8, 10 and 13:

> [25] When Parliament enacted SOSMA, it adopted paras (a), (b), (d) and (f) of cl (1) of Art 149 of the Federal Constitution as recitals (1), (2), (3) and (4) in the preamble of SOSMA. Paragraphs (c) and (e) of cl (1) of art 149 which pertain to races and services to the public, respectively, are expressly excluded in the preamble of SOSMA.
>
> ...
>
> [27] In concluding that the charge against the respondent falls within the ambit and purview of recital or para (e) of art 149(1) of the Federal Constitution, the learned judge took into account the definition of 'sabotage' and the definition of 'essential services' under s 130A(h) of the Penal Code. We found no error in the approach taken by the learned trial judge. It is an established canon of statutory interpretation that the provisions of a law or statute must be looked at as a whole and not in isolation. ... We therefore agreed with the learned judge that the offence under s 124L of the Penal Code for which the respondents are charged fall within art 149(1)(e) of the Federal Constitution, namely an act 'which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof.
>
> [28] Further, we agreed with the learned judge that in determining whether the offence under s 124L of the Penal Code is a security offence under SOSMA, the proper approach to be adopted is the purposive approach.

A ...

[32] The intention of Parliament as to the purpose and object of SOSMA can be seen from the following speech of the Minister in the Prime Minister's Department during the second and third reading of SOSMA Bill 2012:

B ...

[33] From the statements by the Minister, it is crystal clear that the purpose and objective of SOSMA is to combat terrorism.

[34] We next made reference to the internal aid namely the preamble, the scheme and the provisions of SOSMA. The preamble of SOSMA as set out above shows that C SOSMA was enacted to deal with four out of the six categories of action under art 149(1). The scheme and the provisions of SOSMA were designed to limit the fundamental liberties under arts 5, 9,10 and 13 of the Federal Constitution and to depart from the procedures laid down under the Criminal Procedure Code, the law which governs the conduct of criminal cases. Although SOSMA merely regulates D the trial of the offences and does not create the said offences (see *Public Prosecutor v Yazid Sufaat & Ors* [2015] 1 MLJ 571; [2014] 3 MLRA 73; [2014] 2 CLJ 670; [2014] 4 AMR 678), undoubtedly a person charged and tried under SOSMA will lose his liberty as he will be denied bail. In this regard, the learned judge was of the view that in interpreting SOSMA the court should be guided by the principle of E giving full recognition to the fundamental rights and freedom. We found no error in the approach taken by the learned judge.

...

[36] To reiterate, the preamble of SOSMA recites the action under paras (a), (b), (d) and (f) of cl (1) of Art 149 and not the action under paras (c) and (e) of cl (1) of F art 149 of the Federal Constitution. Whilst we found no 6 ambiguity that SOSMA was enacted under art 149(1)(a), (b), (d) and (f) of the Federal Constitution, we found ambiguity whether the charge against the respondents under s 124L of the Penal Code was intended by Parliament to be categorized as security offences under art 149(1) of the Federal Constitution.

G ...

[38] The incorporation or the presence of s 124L in the First Schedule of SOSMA must not be looked at in isolation. Notwithstanding s 124L being listed in the First Schedule of SOSMA, regard must be given to the overall scope, purpose and object of SOSMA. In our judgement, the inclusion of s 124L in the First Schedule does H little to clarify the ambiguity as s 124L cannot change the scope, purpose and object of the enactment of SOSMA. SOSMA being a law which prescribes limitations on the liberty clauses must be construed religiously and any ambiguity must be resolved in favour of the respondents.

I ...

[43] Given that s 124L of the Penal Code falls under cl 1(e) of Art 149 of the Federal Constitution and in the light of the express exclusion of para (e) of cl (1) of art 149 of the Federal Constitution in the preamble of SOSMA, we found ambiguity whether Parliament had intended to categorize an offence under s 124L of the Penal Code as a security offence.

[10] From a reading of the above passages which we feel compelled to quote in *extenso* as it shows the comprehensive rationale of the court, it is clear that SOSMA was enacted pursuant to art 149(1)(a), (b), (d) and (f) of the Federal Constitution. These pertained to actions to cause citizens to fear organized violence against persons, excite disaffection, to procure the alteration of law and prejudicial to public order or security. However art 149(1)(e) was not recited in the preamble to SOSMA. That provision reads:

> which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof.

[11] The court then found that the offence created by s 124L of the Penal Code involved an action which fell under art 149(1)(e) and as it had been excluded in the preamble, there was ambiguity whether Parliament had intended to categorize an offence under s 124L of the Penal Code as a security offence. It also found that the presence of that section in the First Schedule must not be looked at in isolation where regard must be given to the overall scope, purpose and object of SOSMA. The purpose and objective of SOSMA was to combat terrorism.

[12] We would adopt the approach taken in *Khairuddin.* Section 124K of the Penal Code under which the applicant is charged, relates to sabotage of water services which is an essential service defined in s 130A(d)(a) of the Penal Code. It is an action which falls under art 149(1)(e) of the Federal Constitution 'which is prejudicial to the maintenance of the functioning of any supply or service to ...'. In the same vein as *Khairuddin,* when this has been excluded in the preamble, it follows that there is the same ambiguity as to whether s 124K is intended to be categorized as a security offence notwithstanding its inclusion in the First Schedule to SOSMA.

[13] Further, the mere presence of s 124K of the Penal Code in the First Schedule to SOSMA must be looked at in the overall scheme of the purpose and object of SOSMA which has always been to combat terrorism.

[14] We gratefully adopt the words in *Khairuddin* at p 11 that:

> SOSMA being a law which prescribes limitation on the liberty clauses must be construed religiously and any ambiguity must be resolved in favour of the respondents.

[15] We thus find that s 124K of the Penal Code does not fall within the ambit of SOSMA. It follows too that s 13 of the SOSMA does not apply and it does not behove on us to make any finding on its constitutionality or otherwise. Section 388 of the CPC would apply in determining whether bail ought to be granted.

[16] Reference was made by the learned DPP to *Public Prosecutor v Yazid bin Sufaat & Ors* [2015] 1 MLJ 571 at p 576; [2014] 2 CLJ 670 at p 676 that:

> ... By reason of s 2 of the SOSMA, a person charged for committing a security offence will be tried according to the procedures as laid down in SOSMA. It must be noted that SOSMA merely regulates the trial of security offences. It does not create the said offences.

It was thus submitted that the provision of bail ought likewise to be governed by SOSMA, specifically s 13(2).

[17] We take the view that *Yazid bin Sufaat* was concerned with the issue of whether the charges which specifically refer to terrorist acts against members of the public in Syria and not in Malaysia rendered the charges defective and bad in law such that the provisions in SOSMA could not be invoked for the trial. It was in that context that the Court of Appeal said that s 2 of the SOSMA makes it clear that the procedure laid down in SOSMA apply to the trial of any person charged with committing any security offence under Chapter VIA of the Penal Code.

[18] In any event, we have earlier found that s 124K of the Penal Code does not fall within the ambit of SOSMA.

Power to grant bail under s 388 of the CPC

[19] Section 388(1) of the CPC provides as follow:

> (1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the Officer in charge of the Police District or by that Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:
>
> Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

The proviso states that bail may be granted to any person under 16 years, woman or sick or infirm person.

[20] Referring now to the applicant's affidavit in support in encl 2, the reasons given as to why bail ought to be granted are that he is a citizen with no criminal record, has dependents in his wife, a daughter studying in University Selangor and a son in Form One and all of them reside together (para 10). The applicant undertook to comply with any conditions that may be imposed by the court, that he is not a flight risk and will not be tampering with any witnesses (para 11). He is also prepared to surrender his international passport to the court and report monthly to the Investigating Officer, if required (para

12). In para 13 he stated there is a risk to his health if his stay in prison were to be prolonged. The applicant is 44 years old.

[21] From the proviso to s 388(1) of the CPC, the applicant may be allowed bail if he is 'sick or infirm' as he does not fall within the other criteria. That is the threshold level. None of the reasons put forth in paras 10–13 could point towards that. The closest to a health reason was there being a risk to his health were he be subjected to prolonged imprisonment. Once the threshold is met, the other factors such as flight risk or witness tampering may be considered. Under the circumstances, the applicant has not met the conditions for bail to be granted and the court is constrained to dismiss his application.

[22] Reference was made to *Public Prosecutor v Dato' Balwant Singh (No 1)* [2002] 4 MLJ 427; [2002] 4 CLJ 155 where bail was granted to a person charged with a non bailable offence. However in that case the accused was 81 years, afflicted with several serious diseases, to name but three, atherosclerotic heart disease, high blood pressure, severe and brittle diabetics mellitus. He also had a history of two by pass operations. At at p 443 (MLJ); p 169 (CLJ), the court stated that the standing of the accused and his age militates against the prospect of him absconding and it was unable to hold there would be tampering of witnesses.

[23] The Court of Appeal in *Raman a/l Shunmugham lwn Pendakwa Raya* [2020] 2 MLJ 675; [2020] 2 CLJ 818 had granted bail to a person charged under s 130V(1) of the Penal Code by relying on s 13(2). The court opined that s 13 of the SOSMA is akin to s 388 of the CPC and that although security offences are non bailable, there is still a discretion vested in the court to grant bail. There was a medical report to show the applicant there suffered from chronic diabetics until his left leg had to be amputated at knee level and he could only move using crutches and/or wheelchair. The court had no doubt he was a sick and handicapped person. The court also found no evidence of flight risk or witness tampering. This case illustrates no matter which section, whether s 13(2) of the SOSMA or s 388 of the CPC, the considerations are similar in that one looks at the health first.

[24] Similarly in *Tamil Selven a/l Letchumenan v Pendakwa Raya* [2019] MLJU 1123; [2019] 1 LNS 1542, the Court of Appeal allowed bail to an accused charged under s 130V(1) of the Penal Code due to his health condition where it was not disputed he was suffering from chronic diabetes and had one finger of his toe amputated, acute coronary syndrome and HIV positive. The court then noted the accused had promised to comply with all conditions for bail and to attend court without fail whenever his presence is required (paras 7–9).

A CONCLUSION

[25] For the above reasons, we were of the considered opinion that s 124K of the Penal Code does not fall within the ambit of SOSMA. We further find that s 388(1) of the CPC is the applicable provision on bail and that the applicant B has failed to meet the conditions for bail. The application that the applicant be released on bail pending the on going criminal proceedings vide Case No WA-45SO-4–03 of 2021 against him, was dismissed.

Application dismissed.

C

Reported by Ahmad Ismail Illman Mohd Razali

D

E

F

G

H

I